

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JAN -7 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

JAIME MATA BRACAMONTE,

Appellant.

)
)
) 2 CA-CR 2008-0204
) DEPARTMENT B
)

MEMORANDUM DECISION

)
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064771

Honorable Hector E. Campoy, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Patrick C. Coppen

Tucson
Attorney for Appellant

B R A M M E R, Judge

¶1 Jaime Mata Bracamonte appeals his convictions and sentences for possession of a narcotic drug for sale and possession of drug paraphernalia. He argues the prosecutor's misconduct violated his due process rights by making repeated references to irrelevant and prejudicial evidence the trial court had admonished him to refrain from addressing. Bracamonte also asserts one of the jury instructions the court gave was an improper comment on the evidence and violated the Arizona Constitution. Finally, he contends his due process rights were violated by the jury instruction relating to the state's burden of proof, which the court gave pursuant to *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). We affirm.

Factual and Procedural Background

¶2 Bracamonte was arrested in December 2006 after law enforcement officers saw him arrive at an isolated location to which an undercover officer had delivered 1,200 pounds of marijuana. Law enforcement officers conducting surveillance earlier that day had observed three individuals loading the marijuana into another vehicle. One of the individuals was wearing a distinctive blue jacket with white sleeves, the same style jacket Bracamonte had been wearing when he was arrested.

¶3 After a five-day trial, a jury found Bracamonte guilty of possession of a narcotic drug for sale and possession of drug paraphernalia. The trial court sentenced him to substantially mitigated, concurrent, prison terms of 10.5 and 2.25 years, respectively. This appeal followed.

Discussion

¶4 Bracamonte first contends that, as a result of prosecutorial misconduct, he was denied a fair trial and his due process rights were violated.¹ *See State v. Hughes*, 193 Ariz. 72, 79, 969 P.2d 1184, 1191 (1998) (“To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor’s misconduct ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’”), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). During opening statements, prosecutor Richard Wintory made remarks that associated Bracamonte with a violent, international, drug trafficking cartel. In response to Bracamonte’s objection, Wintory explained that the nature of the organization was relevant to rebut Bracamonte’s mere presence defense. The trial court disagreed, reasoning that “talking about what the cartel is and what the risk of violence is and drug operations” was outside the scope of the case. The court permitted Wintory to rebut Bracamonte’s defense by referring to the organization’s need for secrecy, but instructed him to “[s]tick to the facts of this case” and refrain from referring to the organization’s international scope or violent character.

¹Bracamonte fails to specify in his opening brief whether it is the due process clause of the United States Constitution, the Arizona Constitution, or both, upon which he relies. *See* U.S. Const. amends. V, XIV, § 1; Ariz. Const. art II, § 4. We do not examine independently due process issues under our state constitution if a party fails to engage in state constitutional analysis. *See State v. Nunez*, 167 Ariz. 272, 274 n.2, 806 P.2d 861, 863 n.2 (1991) (addressing federal constitutional provision only where party fails to make separate state constitutional argument). Because Bracamonte does not provide us any state constitutional analysis, we decline to do so.

The court also gave the jury a curative instruction, telling it to disregard Wintory's "international references" and "references to violence."

¶5 Bracamonte complains in his opening brief that despite the court's admonition, Wintory "continued to ask questions or make [improper] statements." Without further explanation, Bracamonte provides numerous, purportedly supporting citations to the record. He also argues, without analysis, that Wintory "inject[ed] . . . prejudicial information into the trial" despite the court's admonition. Bracamonte does not specify whether he objected and, if so, whether he objected sufficiently, to Wintory's allegedly improper questions and comments. Nor does he provide us the appropriate standard of review. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶6 The state responds that Bracamonte's "untimely and insufficiently argued" claim is waived, and at the very least he forfeited the right to seek relief for all but fundamental, prejudicial error, because he did not assert in the trial court that the prosecutor committed misconduct. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). In his reply brief, Bracamonte spends nearly twenty pages providing excerpts from those portions of the record he contends illustrate the prosecutor had committed misconduct. Bracamonte insists he did object to Wintory's improper comments, and thereby preserved "trial error review." Alternatively, he insists he has demonstrated the error here was both fundamental and prejudicial because he was deprived of a fair trial and "several" jurors "had difficulty in rendering a guilty verdict and were not totally sure that [he] was guilty."

¶7 The state is correct that Bracamonte did not assert in the trial court the claims he is raising on appeal. He had objected to Wintory’s opening statements on what the trial court interpreted to be relevance and undue prejudice grounds. His two non-specific objections at trial, including a “continuing objection,” were apparently on the same grounds. The only specific objections he raised were hearsay and relevance. These objections did not preserve his claim of prosecutorial misconduct and the related claim that his due process rights were violated. *See State v. Rutledge*, 205 Ariz. 7, ¶ 30, 66 P.3d 50, 56 (2003) (objection to state’s ““shifting the burden”” inadequate to raise or preserve prosecutorial misconduct claim).

¶8 Moreover, prosecutorial misconduct is the result of pronounced, persistent, and cumulative misconduct, *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191, the overall effect of which is best evaluated at the end of trial. Yet Bracamonte did not move for a mistrial, which would have placed the issue squarely before the trial court at the appropriate time. “[T]he trial court is in the best position to determine the effect of a prosecutor’s comments on a jury.” *State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006); *see also State v. Atwood*, 171 Ariz. 576, 611, 832 P.2d 593, 628 (1992) (trial court better judge of prosecutor’s “tone of voice, facial expressions, and their effect on the jury, if any”), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). And when prosecutorial misconduct is brought to the trial court’s attention through a motion for a mistrial, this court typically will defer to the trial court’s determination. *See Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846. (“[W]e will not disturb

a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion.”).

¶9 But, Bracamonte did not bring the purported misconduct to the trial court's attention. As we previously stated, he has thereby forfeited the right to relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Additionally, Bracamonte has not presented these claims adequately in his opening brief, failing to establish the error was fundamental and prejudicial. Although he attempts to do so in his reply brief, we do not address issues raised for the first time in a reply brief. *See State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998); *see also State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (“[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.”), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (failure to argue alleged error fundamental results in waiver); Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include argument stating party's contentions, reasons therefor, and necessary supporting authority).

¶10 Bracamonte next contends one of the trial court's instructions to the jury was an improper comment on the evidence, which violated the Arizona Constitution. *See* Ariz. Const. art. VI, § 27 (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”). During direct examination,

Bracamonte's mother testified he had been at her house at 2:15 p.m., just minutes after the law enforcement officers had seen three men loading marijuana onto the truck: she had previously told an investigator that Bracamonte had arrived at her house at 2:30. Although she later clarified that 2:30 was correct, the state objected, asserting Bracamonte had failed to disclose an alibi defense, as required by Rule 15.2(b), Ariz. R. Crim. P.

¶11 Bracamonte informed the trial court he had not intended to assert an alibi defense and was surprised by his mother's testimony that he had been at her house at 2:15. The court nonetheless found Bracamonte had violated the disclosure rules and noted that, as a sanction, it could preclude the testimony or declare a mistrial. The state objected to both suggested remedies. Instead, it asked the court to instruct the jury that because Bracamonte had violated the discovery rules, that violation was "an appropriate factor for [the jury] to consider in determining the credibility [of the witness]." Over Bracamonte's objection, the court instructed the jury that Bracamonte's failure to disclose his mother as an alibi witness had violated the Rules of Criminal Procedure. It further instructed the jury as follows:

[Y]ou can consider the untimely disclosure of this alibi in part of your examinations of the credibility of the definitions of the alibi or the witness herself.

You can consider that [violation] in light of all the factors of credibility that you are going to be asked to consider. But it is a factor that I am calling to your attention for your consideration based on the late disclosure.

¶12 Bracamonte concedes that, although he had objected to the trial court’s instruction as a sanction, he did not object to it on the basis it was an unconstitutional comment on the evidence. Accordingly, Bracamonte has again forfeited the right to seek relief on this ground unless the error is both fundamental and prejudicial. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Just as with his prosecutorial misconduct claim, however, Bracamonte does not argue in his opening brief that this alleged error was fundamental. The argument is therefore waived.² *See Moody*, 208 Ariz. 424, n.9, 94 P.3d at 1147 n.9; *Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140; *Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d at 593; *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶13 Even if the claim were not waived, however, Bracamonte has failed to demonstrate he was prejudiced by this purported error. To prevail under fundamental error review, “a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Bracamonte concedes the trial court was entitled to sanction him for violating the disclosure rules by limiting or entirely precluding the use of his mother’s testimony. *See* Ariz. R. Crim. P. 15.7(a)(1). Because he was not entitled to have the jury consider his

²Bracamonte asserts in a footnote in his reply brief that “the case law cited by the State” does not stand for the proposition that “the failure to argue fundamental error from the outset[] forfeits a criminal defendant’s constitutional right to have his conviction reviewed for error.” Not only is his statement entirely unsupported, it is incorrect. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (concluding argument waived because defendant “d[id] not argue the alleged error was fundamental”); *Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d at 593 (concluding issue first raised in reply brief waived).

mother's testimony, he cannot demonstrate he was prejudiced by any improper comment suggesting the trial court "did not believe [the] testimony and that it was a fabrication."

¶14 Finally, Bracamonte contends the jury instruction on the state's burden of proof, which was consistent with our supreme court's directive in *Portillo*, 182 Ariz. at 598, 989 P.2d at 974, resulted in a denial of his right to a fair trial, in violation of federal due process. Our supreme court recently "'reaffirmed a preference for the *Portillo* instruction' and rejected the invitation to revisit *Portillo*." *State v. Garza*, 216 Ariz. 56, ¶ 45, 163 P.3d 1006, 1016-17 (2007), *quoting State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006). "[W]e are bound by decisions of the Arizona Supreme Court and have no authority to overrule, modify, or disregard them." *City of Phoenix v. Leroy's Liquors, Inc.*, 177 Ariz. 375, 378, 868 P.2d 958, 961 (App. 1993). Accordingly, we do not further address this argument.

Disposition

¶15 For the foregoing reasons, we affirm Bracamonte's convictions and the sentences imposed.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge